Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

IN THE MATTER OF ARTHUR O. KLEIN, RESPONDENT
Docket Number 84-1
October 19, 1987

William J. Carter, Esq.

Harris A. Pitlick, Esq.

Donald W. Peterson

Deputy Assistant Secretary and Deputy Commissioner of Patents and Trademarks

AMENDED DECISION [FNa1]

***1** This is a disciplinary proceeding initiated against Arthur O. Klein, an attorney currently registered to practice before the United States Patent and Trademark Office (PTO), registration number 19102. The proceeding is brought under 35 U.S.C. § 32 and the regulations promulgated thereunder, 37 C.F.R. Part 1.

The Respondent is charged in the Notice of Proceeding dated August 17, 1984, with four counts of alleged misconduct arising out of the handling of eleven papers in ten separate patent applications, and in giving false answers in PTO Requirements for Information relating to two of the ten applications, in violation of 37 C.F.R. § § 1.344 and 1.56, DR 1-102(A)(4), and DR 6- 101(A)(3) of the Code of Professional Responsibility of the American Bar Association (1970) (the Code). The Solicitor seeks to have Respondent suspended or excluded from further practice before the PTO. The matter was assigned to Administrative Law Judge (ALJ) Hugh J. Dolan and a hearing, requested by Respondent, was held at two locations on the following dates: On June 24-25, 1985, in Arlington, Virginia; on June 26-28, 1985, in New York City, New York; and on July 1, 2 and 15, 1985, and March 26, 1986, in Arlington Virginia.

After careful review of the evidence and the arguments presented by the Respondent and the Solicitor, Judge Dolan prepared a Recommended Decision, dated May 2, 1986, in which he recommended that Respondent be barred from practice before the United States Patent and Trademark Office.

Respondent duly filed Respondent's Exceptions to the Recommended Decision of the Administrative Law Judge. Having reviewed the record in these proceedings, and having considered fully Respondent's Exceptions as well as "Respondent's Point by Point Submission in Opposition to the Recommendation of the Administrative Law Judge," I adopt the Recommended Decision, dated May 2, 1986, but modify it as set forth below.

THE COUNTS

Count 1 accuses Respondent of willfully engaging in dishonesty, fraud, deceit or misrepresentation, and violating the duty of candor and good faith, in filing, or causing to be filed, in the PTO one or more of eleven papers, each with a certificate of mailing pursuant to 37 C.F.R. § 1.8 [FN1], when he knew or should have known that each would be mailed after the date on the corresponding certificate of mailing. These papers are referred to as Responses I-XI, respectively, in the Notice and in the record.

Count 2 accuses Respondent of neglect of legal matters entrusted to him in that one or more of Responses I-XI were mailed to the PTO after the due date for response and, hence, in an untimely manner.

***2** Counts 3 and 4 accuse Respondent of willfully engaging in dishonesty, fraud, deceit or misrepresentation, and violating the duty of candor and good faith, in giving false answers to questions in PTO Requirements for Information. The Requirements for Information were in respective applications, each the subject of a Count.

In summary, the Government contends that Respondent backdated submissions and certificates of mailing, thereby representing that his submissions to the PTO in the ten noted applications were timely when they were, in fact, late. The Respondent contends that all submissions were timely and in accordance with the certificate of mailing practice (37 C.F.R. § 1.8), and that any recorded delays were due to the Postal Service and/or the PTO mailroom.

I. THE CERTIFICATES OF MAILING

The Respondent argues that the ALJ erred in holding the Respondent had signed all the certificates of mailing. The ALJ's holding was, in fact, that Respondent was responsible for the certificates of mailing, whether signed by him personally or by his employee secretary [FN2].

II. KLEIN AND VIBBER OFFICE PRACTICES

The Respondent noted numerous exceptions to the ALJ's findings regarding the office practices of Respondent.

III. PTO MAILROOM PRACTICE

The Respondent notes numerous exceptions to the ALJ's findings and ultimate holding that the operation of the PTO mailroom did not contribute to the delays in the receipt of the papers which form the charges against the Respondent in Counts 1 and 2.

IV. U.S. POSTAL SERVICE TIME

The Respondent claims reliance on the U.S. Postal Service's Origin-Destination Information System (ODIS) as evidence of delivery time is misplaced.

V. RESPONDENT'S CERTIFICATE OF MAILING PRACTICE AND DETERMINATION OF RELEVANT DATA

The Respondent notes exceptions to the ALJ's findings and conclusions as they relate to the number of patent applications involved, the PTO's computer printout used to determine the relevant application population and the failure to include Trademark applications in the population.

VI. U.S. POSTAL SERVICE DATA AND OTHER DATA

The Respondent also notes numerous exceptions to the findings based upon the statistical data of the Postal Service's Origin-Destination Information System (ODIS) and the conclusion that the ODIS Reports, comparisons with other firms in Respondent's area and with other members of the Klein and Vibber firm, as well as common sense and shared experience with the postal system are clearly convincing that the number and percentage of Respondent's alleged mail delays were not attributable to the U.S. Postal Service.

VII. REQUIREMENTS FOR INFORMATION

The Respondent notes exceptions to the Requirements for Information issued by the PTO in regard to papers filed in two (2) of the applications upon which these charges are based, as well as the charges flowing from the Respondent's allegedly false answers thereto.

VIII. DUE PROCESS

***3** Respondent contends that the statutes and regulations governing PTO disciplinary proceedings not only violate his due process rights by imprecisely establishing applicable standards of conduct, but the failure to accept all the Respondent's submissions in this proceeding likewise constitute a breach of his guarantees of due process.

IX. STANDARD OF NEGLECT

The Respondent contends there must be a showing of willful neglect before a violation may be found and that such has not been shown by clear and convincing evidence.

With respect to the noted (I-IX) areas of exception, it is my conclusion that the exceptions are without merit and that the ALJ has adequately treated these matters at pages 7 through 27 of the Recommended Decision. I find nothing in these exceptions to the Recommended Decision which requires any amendments to the Recommended Decision as it relates to these areas other than as noted with respect to item I and adopt the conclusions of the ALJ as set forth on pages 35 and 36 of the Recommended Decision except for the ALJ's reference on page 35 to an "absence of any prior charges, investigation or disciplinary proceedings brought by any bar association or the Patent and Trademark Office." The fact is there is no evidence of record on any of these points. In fact, Respondent did not introduce any evidence as to his good character or reputation. Therefore, I conclude that there is no evidence on which to base such a conclusion.

I conclude that there are no mitigating or extenuating circumstances in this case. On the contrary, there are present certain aggravating factors, such as Respondent's lack of cooperation during the course of this proceeding, Respondent's misleading use of evidence at the hearing and Respondent's misstatements of facts in his post-hearing briefs.

As an example of lack of cooperation, the record indicates that Respondent at first refused to comply with any of the pre-hearing discovery requests of the Solicitor, which included requests for non-privileged material and relevant evidence, and then when required to do so by order of the ALJ, Respondent failed to comply completely. The Respondent, in his Answer, instead of admitting or denying that he signed certain documents apparently containing his signature and filed in particular patent applications, he represented, as was his right, that he had no knowledge sufficient to form a belief as to whether he signed them on the ground that he no longer possessed records on the applications. However, when the Solicitor thereafter sent Respondent true copies from PTO records of these documents and offered the originals up for his inspection, Respondent still refused to admit or deny his signature [FN3] (see the Solicitor's Motion In Limine filed June 10, 1985). It was not until the hearing, after the Solicitor went to the trouble of subpoenaing employees of Respondent's law firm who were familiar with his signature, and after ordered to do so by the ALJ (see Order of the ALJ entered June 21, 1985, item 7), that Respondent admitted his belief that the signatures were his (see I:126-151).

***4** An example of misleading use of evidence at the hearing is Respondent's exhibit RX-87A, in an attempt to show an irregularity in date stamping by the mailroom. The exhibit indicates that the Assignment Branch of the PTO cancelled the PTO receipt date of June 29, 1983, not because the paper was not received that date, but most likely due to some irregularity in the assignment alluded to therein. The paper was, in fact, resubmitted to the PTO and received on August 25, 1983 (I:287.22-291.23). The July 1, 1983 Finance Branch date at the bottom is consistent with the correctness of the original June 29, 1983 receipt date and is in no way indicative of any irregularity in date stamping by the mailroom (see the Solicitor's Post-Hearing Submission at pages 73-74).

An example of the misstatements of fact in Respondent's post-hearing briefs based on evidence which has either been discredited, misinterpreted or taken out of context, or which is simply not in the

record, or which ignores other equally or more probative evidence which explains, qualifies or contradicts the evidence on which the misstatements are based, is with regard to the Klinkhardt application (Responses X and XI). Respondent refers to a letter to the client dated April 11, 1983 regarding a "Petition" (B. 7, PFF 367). The (German language original) letter--RX-436--refers to an "eingable", meaning an amendment, not a petition. The letter does not refer at all to a petition to extend the time (Response X). Moreover, the statement "[a] Petition for Extension of Time was mailed with the Amendment to the PTO which extended the due date for the PTO response from March 8, 1983 to April 8, 1983" (emphasis added) (B.12) is incorrect. Even Respondent admits that these papers-- Responses X and XI--were mailed separately (GX-33, page 3), (see Solicitor's Rebuttal Brief, filed October 30, 1985).

Respondent states in his cover letter of November 17, 1986, that "Respondent's Point by Point Submission In Opposition to the Recommended Decision of the Administrative Law Judge" is made "under protest" because his non-entered brief of September 29, 1986 (Respondent's Principal Brief) was found to be not in compliance with the Decision on Briefs entered August 7, 1986.

Respondent's principal argument is that the Deputy Commissioner's decision requiring that the brief be limited to "specific references to the record corresponding to the exceptions noted ..." denies Respondent "an opportunity to explain in coherent fashion the reasons why the RD cannot be adopted". He further contends that:

> The required format of numbered Exceptions in numerical order, rather than topical order as they relate to each other as a whole, so seriously dilutes the force of Respondent's legitimate complaints about the RD that it denies Respondent the right to a full and fair review of the RD by the Commissioner.

First of all, the Respondent's Submission incorporates, essentially verbatim, the Respondent's Principal Brief, albeit that it is rearranged in numerical order and includes, for the most part, specific references to the record. The Submission does include "substantial further argument", hence Counsel has ignored that portion of the Deputy Commissioner's Order. Since the Solicitor did not object to the inclusion of further argument, the Submission was accepted as being in compliance with the Order. Note, for example, pages 65 through 85, of "Respondent's Point by Point Submission In Opposition to the Recommended Decision of the Administrative Law Judge", wherein Respondent's Counsel presents extensive arguments relating to Respondent's Exceptions 66-71.

***5** Secondly, the reason the order requested the numerical and sequential response was to facilitate a thorough consideration of the complex issues in this case in light of the one hundred forty-three (143) exceptions noted by Respondent.

Therefore, contrary to the Protest made by Respondent's Counsel, Respondent has been accorded a full and fair opportunity to seek a review of the Recommended Decision of the ALJ. Furthermore, in reaching this decision, the undersigned gave full consideration to all of the briefs filed with the ALJ including the post-hearing submissions.

Counsel for Respondent has repeatedly argued that the case against his client is based primarily on statistical evidence from the U.S. Postal Service. I did not consider it so. The other evidence in this case (discussed in the following paragraphs) is, in my opinion, clear and convincing with respect to the findings in the case.

For example, over the time period in question (June 2, 1981 through May 31, 1983) fifty-six (56) papers were found which were filed by the Klein and Vibber firm with both a certificate of mailing and having a mailroom date stamp before May 31, 1983 (GX-3). Respondent signed twenty-five (25) of these papers (K cases) and the remainder were signed by other agents and attorneys at the firm (N-K cases).

It is significant to note that of the N-K cases (GX-18A), ten (10) included certificates of mailing signed by Respondent (the accompanying papers being the responsibility of another member of the firm), but none had a service or delivery time which exceeded five (5) days and in most cases the service time was three (3) days or less. In other words, other members of the Klein and Vibber firm who had responsibility for filing papers at the PTO, had no apparent trouble in getting mail delivered to the PTO. Yet of the nineteen (19) papers in patent applications with Respondent's signature and a certificate of mailing signed by Respondent, ten (10) took over a week to arrive at the PTO (see GX-18).

Add to this the data from the survey of papers at the Soffen firm, the Fitzpatrick firm data, and Darby and Darby firm, and the Connecticut cases data, where the evidence shows that the percentage of first class mail taking over a week to get to the PTO was approximately one percent or less.

Of particular concern here is the pattern of misconduct evidenced during the time period of November 1982 through March 1983 (involving Responses II through IX) where every paper filed by Respondent with a certificate of mailing was at least a week and most frequently more than two weeks in arriving at the PTO based on the certificate of mailing date (see GX-18). It, therefore, defies logic as to how all of these cases prosecuted by Respondent could have been mishandled by the U.S. Postal Service and/or the PTO to have resulted in such a clear departure from the norm. Clearly, no one else at the Klein and Vibber firm or at the other firms surveyed experienced such mail service. If there was an isolated case involving a certificate of mailing, then the trier of fact could logically conclude that it was consistent with the statistics from the other firms and also from the U.S. Postal Service. The pattern of misconduct by Respondent was clearly established.

***6** While the evidence of backdating and late mailing by Respondent is circumstantial, such does not mitigate against its meeting the requisite standard of proof (clear and convincing evidence). That Respondent intentionally engaged in acts of misconduct relating to the use of certificates of mailing is clearly and convincingly established by the evidence of record, i.e. the statistical evidence from the Postal Service relating to the normal delivery time for mail between New York and Washington; the non-delayed arrival at the PTO of other items of mail from the Klein firm and from similarly located law firms and the out of order checks used by Respondent to pay fees in those untimely responses requiring a fee. It is appropriate here, as in

criminal law, that to meet the burden of proof the government may rely upon circumstantial evidence. U.S. v. Meyers, 601 F.Supp. 1072, 1074, D.C.Org. (1984). [FN4]

As for the rebuttal evidence submitted by Respondent, to the extent the Respondent relied upon these incomplete copies of the mail logs as evidence rebutting the Solicitor's case the mail logs are not entitled to any weight whatsoever. It is elementary hornbook law that with respect to any documentary evidence, the best evidence is the original. [FN5] Respondent and his counsel were put on notice as early as October 31, 1984 by the Solicitor's request for these documents. Once having been put on notice that these mail log documents were important to the prosecution, Respondent and his counsel had a duty to safeguard such evidence. [FN6] The record is devoid of any evidence which would show that any safeguards were even undertaken. They had the originals when they produced the incomplete copies. [FN7] The apparent loss of these original documents is inexcusable. Therefore, the prohibition relating to the mail log evidence runs only to the Respondent.

As for the testimony of Respondent's employees, it was the ALJ who observed the witnesses in this case. Hence, the ALJ is the one who had to judge the credibility of the witnesses. Since the inception of our U.S. legal system, triers of fact have been known to accord little weight or no weight whatsoever to testimony of some or all of the witnesses produced by one side in a lawsuit. As the reviewing authority who was not present to judge the credibility of the witnesses, I must defer to judgments made in this regard by the ALJ.

FINDINGS OF FACT

1. Arthur O. Klein, Respondent, is an attorney registered to practice before the Patent and Trademark Office (PTO), registration number 19102.

I. The ROMER Application

2. Respondent was attorney of record in patent application Serial No. 06/67,143, in the name of Romer et al.

3. The PTO notified Respondent that payment of the base issue fee was due on or before June 2, 1981, and the base issue fee was received in the PTO on June 2, 1981.

4. An amendment (Response I), due on or before the date the issue fee was to be paid under C.F.R. § 1.312, signed by Respondent and accompanied by a certificate of mailing (also signed by Respondent), was received in the PTO on July 2, 1981--30 days after the date on the certificate of mailing and due date for Response.

***7** 5. The certificate of mailing represented that Response I was mailed to the PTO on June 2, 1981.

6. The PTO mailroom date of receipt of July 2, 1981, is accurate.

7. Respondent knew or should have known that Response I was mailed to the PTO after June 2, 1981, and was not deposited in the mail on June 2, 1981.

II. The STOEV Application

8. Respondent was attorney of record in patent application Serial No. 06/198,861, in the name of Stoev et al.

9. The PTO notified Respondent that Response II, petition to extend time, and appropriate fee were due on or before November 23, 1982.

10. A petition to extend time and Response II, signed by Respondent and accompanied by a certificate of mailing (also signed by Respondent), were received in the PTO on December 2, 1982--nine (9) days after the date on the certificate of mailing and due date for Response.

11. The certificate of mailing represented that Response II was mailed to the PTO on November 23, 1982.

12. The PTO mailroom date of receipt of December 2, 1982, is accurate.

13. Respondent knew or should have known that Response II was mailed to the PTO after November 23, 1982, and was not deposited in the mail on November 23, 1982.

III. The PRASIL Application

14. Respondent was attorney of record in patent application Serial No. 06/199,501, in the name of Prasil et al.

15. The PTO notified Respondent that Response III, petition to extend time, and appropriate fee were due on or before January 14, 1983.

16. A petition to extend time and Response III, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), were received in the PTO on January 27, 1983--13 days after the date on the certificate of mailing and due date for Response.

17. The certificate of mailing represented that Response III was mailed to the PTO on January 14, 1983.

18. The PTO mailroom date of receipt of January 27, 1983, is accurate.

19. Respondent knew or should have known that Response III was mailed to the PTO after January 14, 1983, and was not deposited in the mail on January 14, 1983.

20. The PTO sent Respondent Requirement for Information A on June 11,

1984, questioning Respondent about mail log date entries.

21. Requirement A stated:

2. The copy of the page from the mail log attached to question 1 of the last Requirement for Information raises some questions. At the top of the page is the heading "January 14, 1983" and listed thereunder are two entries, each with a later date in January 1983. At the bottom there is an item identified as "Customer's Receipt Number."

a. For each entry, what is the significance of the particular January date (other than January 14, 1983)?

Respondent's response filed on July 9, 1984, answered:

2(a). In the fourth line of the page of the mail-log there is the date January 21, 1983. And in the tenth line of the mail-log there is the date January 27, 1983. These dates refer to the dates the items were received by the Patent and Trademark Office according to our return postcard.

***8** 22. It was represented the practice at Klein and Vibber during 1981- 1983 was to enter the firm's return-receipt postcard date as the second date entered in the mail logs.

23. Respondent's answer that the date of January 21, 1983, in the mail log refers to the date the item was received in the PTO is not only erroneous, but no item listed in entry (1) of mail log A was received in the PTO on January 21, 1983.

24. Respondent knew or should have known that his answer in Requirement A was false. Respondent made certain statements, material to the inquiry, in answer to the Requirement for Information. The correct response, however, would have been substantially different from what he represented. Since it was within his ability to know and he was obligated to know the accurate answer, Respondent made a false representation.

IV. The BLOMENROEHR Application

25. Respondent was attorney of record in patent application Serial No. 06/238,372, in the name of Blomenroehr.

26. The PTO notified Respondent that Response IV was due on or before February 22, 1983.

27. Response IV, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), was received in the PTO on March 8, 1983--14 days after the date on the certificate of mailing and due date for response.

28. The certificate of mailing represented that Response IV was mailed to the PTO on February 22, 1983.

29. The PTO mailroom date of receipt of March 8, 1983, is accurate.

30. Respondent knew or should have known that Response IV was mailed to the PTO after February 22, 1983, and was not deposited in the mail on February 22, 1983.

V. The REINECKE Application

31. Respondent was attorney of record in patent application Serial No. 06/222,527, in the name of Reinecke et al.

32. The PTO notified Respondent that the Response V was due on or before February 24, 1983.

33. Response V, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), was received in the PTO on March 14, 1983--16-18 days after the date on the certificate of mailing and due date for response.

34. The certificate of mailing represented that Response V was mailed to the PTO on February 24, 1983.

35. The PTO mailroom date of receipt of March 14, 1983, is accurate.

36. Respondent knew or should have known that Response V was mailed to the PTO after February 24, 1983, and was not deposited in the mail on February 24, 1983.

VI. The METZ Application

37. Respondent was attorney of record in patent application Serial No. 06/185,581, in the name of Metz et al.

38. The PTO notified Respondent that Response VI, Notice of Appeal, petition to extend time, and appropriate fee were due on or before February 28, 1983.

39. A petition to extend time for response and appropriate fee were received in the PTO on February 28, 1983, but it was not accompanied by the Notice of Appeal.

***9** 40. Response VI, Notice of Appeal, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), was received in the PTO on April 25, 1983--54-56 days after the date on the certificate of mailing and due date for response.

41. The certificate of mailing represented that Response VI (Notice of Appeal) was mailed to the PTO on February 28, 1983.

42. The PTO mailroom date of receipt of April 25, 1983, is accurate.

43. Respondent knew or should have known that Response VI was mailed to the PTO after February 28, 1983, and was not deposited in the mail on February 28, 1983.

VII. The CECH Application

44. Respondent was attorney of record in patent application Serial No. 06/190,730, in the name of Cech et al.

45. The PTO notified Respondent that Response VII, petition to extend time, and appropriate fee were due on or before March 14, 1983.

46. A petition to extend time for response and appropriate fee were received in the PTO on March 10, 1983, but it was not accompanied by the Notice of Appeal.

47. Response VII, Notice of Appeal, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), was received in the PTO on March 28, 1983--12-14 days after the date on the certificate of mailing and due date for response.

48. The certificate of mailing represented that Response VII was mailed to the PTO on March 14, 1983.

49. The PTO mailroom date of receipt of March 28, 1983, is accurate.

50. Respondent knew or should have known that Response VII was mailed to the PTO after March 14, 1983, and was not deposited in the mail on March 14, 1983.

VIII. The MENGES Application

51. Respondent was attorney of record in patent application Serial No. 06/255,843, in the name of Menges et al.

52. The PTO notified Respondent that Response VIII was due on or before March 16, 1983.

53. Response VIII, signed by Respondent and accompanied by a certificate of mailing (signed by the Respondent's secretary, Brigitte Metzler), was received in the PTO on April 11, 1983--24-26 days after the date on the certificate of mailing and due date for response.

54. The certificate of mailing represented that Response VIII was mailed to the PTO on March 16, 1983.

55. The PTO mailroom date of receipt ofApril 11, 1983, is accurate.

56. Respondent knew or should have known that Response VIII was mailed to the PTO after March 16, 1983, and was not deposited in the mail on March 16, 1983.

IX. The SAMSINAKOVA Application

57. Respondent was attorney of record in patent application Serial No. 06/251,924, in the name of Samsinakova et al.

58. The PTO notified Respondent that Response IX was due on or before

March 30, 1983.

59. A petition to extend time and Response IX, signed by Respondent and accompanied by a certificate of mailing (also signed by the Respondent), were received in the PTO on April 7, 1983--8 days after the date on the certificate of mailing and due date for response.

***10** 60. The certificate of mailing represented that Response IX was mailed to the PTO on March 30, 1983.

61. The PTO mailroom date of receipt of April 7, 1983, is accurate.

62. Respondent knew or should have known that Response IX was mailed to the PTO after March 30, 1983, and was not deposited in the mail on March 30, 1983.

63. The PTO sent Respondent Requirement for Information B on December 14, 1983, questioning Respondent about mail log date entries.

64. Requirement B stated:

2. The copy from the page from the mail log attached in response to question 4 of the last Requirement for Information raises some questions. At the top of the page is the heading "March 30, 1983 Certificate of Mailing" and listed thereunder are four entries, each with a date in April 1983.

a. Does the above-mentioned heading indicate that all four entries were mailed to the PTO with a certificate of mailing of March 30, 1983? If not, what does the heading refer to?

b. For each entry, what is the significance of the particular April date?

Respondent's response filed July 9, 1984, answered:

2(a). Yes.

2(b). In each case the date in April refers to the date when the item was received by the Patent Office according to our return postcard.

65. It was the practice at Klein and Vibber during 1981-1983 to enter the firm's return-receipt postcard date as the second date entered in the mail logs.

66. Respondent's answer that the four entries under the heading "March 30, 1983," were mailed with certificates of mailing was false, since only item 4 was mailed with a certificate of mailing.

67. Respondent's answer that the April, 1983 dates in the mail log refer to the date the items were received in the PTO is not only false but none of the items listed in entries (1), (2), and (3) of mail log B was received in the PTO on the April dates listed therein therein.

68. Respondent knew or should have known that his answers in Requirement B were false. Respondent made certain statements, material to the inquiry, in answer to the Requirement for Information. The correct responses, however, would have been substantially different from what he represented. Since it was within his ability to know and he was obligated to know the accurate answer, Respondent made a false representation.

X and XI. The KLINKHARDT Application

69. Respondent was attorney of record in patent application Serial No. 06/257,263, in the name of Klinkhardt et al.

70. The PTO notified Respondent that Response X, petition to extend time, and appropriate fee were due on or before April 8, 1983.

71. A petition to extend time (Response X), signed by Respondent and appropriate fee accompanied by a certificate of mailing (also signed by the Respondent), were received in the PTO on May 18, 1983--40 days after the date on the certificate of mailing and due date for response.

72. The certificate of mailing represented that Response X was mailed to the PTO on April 8, 1983.

***11** 73. The PTO mailroom date of receipt of May 18, 1983, is accurate.

74. Respondent knew or should have known that Response X was mailed to the PTO after April 8, 1983, and was not deposited in the mail on April 8, 1983.

75. Response XI, in the form of an amendment to the Klinkhardt application, was due on or before April 8, 1983, after a one month extension of time.

76. Response XI, signed by Respondent and accompanied by a certificate of mailing (signed by Respondent's secretary, Brigitte Metzler), was received in the PTO on April 18, 1983--8-10 days after the date on the certificate of mailing and due date for response.

77. The certificate of mailing represented that Response XI was mailed to the PTO on April 8, 1983.

78. The PTO mailroom date of receipt of April 18, 1983, is accurate.

79. Respondent knew or should have known that Response XI was mailed to the PTO after April 8, 1983, and was not deposited in the mail on April 8, 1983.

CERTIFICATES OF MAILING

80. By representing or allowing a member of his staff to represent that Responses I-XI were mailed on certain dates to the PTO when, in fact, he knew or should have known these Responses were deposited in the mail after the dates represented, Respondent willfully engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of 37 C.F.R. § 1.344 and DR 1-102(A)(4) of the Code of Professional Responsibility of the American Bar Association (1970), and willfully failed to comply with the "candor and good faith" standard established by the Supreme Court in Kingsland v. Dorsey, 338 U.S. 318, 319 (1949) and the duty of candor and good faith toward the PTO as

required by 37 C.F.R. § 1.56.

81. By mailing, causing, or allowing to be mailed to the PTO Responses I-XI after the due dates for Responses (the dates to prevent the corresponding applications from becoming abandoned), Respondent neglected legal matters entrusted to him, in violation of 37 C.F.R. § 1.344 and DR 6-101(A)(3) of the Code of Professional Responsibility of the American Bar Association (1970).

REQUIREMENTS FOR INFORMATION

82. By answering in Requirement for Information A that the mail log entry dates refer to the dates the items were received in the PTO according to the return-receipt postcards, when Respondent knew or should have known that this answer was false, Respondent willfully engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of 37 C.F.R. § 1.344 and DR 1-102(A)(4) of the Code of Professional Responsibility of the American Bar Association (1970), and willfully failed to comply with the "candor and good faith" standard established by the Supreme Court in Kingsland v. Dorsey, supra, and the duty of candor and good faith toward the PTO as required by 37 C.F.R. § 1.56.

***12** 83. By answering in Requirement for Information B that the mail log entry dates refer to the dates the items were received in the PTO according to the return-receipt postcards and that the listed items were mailed with certificates of mailing when Respondent knew or should have known that these answers were false, Respondent willfully engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of 37 C.F.R. § 1.344 and DR 1.102(A)(4) of the Code of Professional Responsibility of the American Bar Association (1970), and willfully failed to comply with the "candor and good faith" standard established by the Supreme Court in Kingsland v. Dorsey, supra, and the duty of candor and good faith toward the PTO as required by 37 C.F.R. § 1.56.

In arriving at the above findings, I have thoroughly reviewed the Recommended Decision of Administrative Law Judge Dolan and have carefully considered the evidence, the Respondent's and the Solicitor's exhibits and the testimony upon which it is based. Recognition and due consideration have been given to Respondent's many years of practice before the Patent and Trademark Office.

Based on this record, I adopt and incorporate herein by reference the Recommended Decision with slight modification to the findings, supra, and adopt as the ultimate finding that Respondent willfully engaged in dishonesty, fraud, deceit and misrepresentation. He also neglected legal matters entrusted to him, all in violation of 37 C.F.R. § 1.344 and DR 1-102(A)(4) and DR-6-101(A)(3), respectively, of the Code of Professional Responsibility of the American Bar Association (1970) as charged in count 2 and willfully violated the duty of candor and good faith required under 37 C.F.R. § 1.56, with respect to each of the charges in counts 1, 3, and 4 established here.

The Respondent did consciously allow his submissions to be sent late and backdated. Once the contract courier was missed, because his

submissions were not ready, some of the mailings were put off. Delay and falsification of dates became something of a habit for his filings. The attempted coverup which led to the false responses to the subsequent legitimate inquiries by the Patent and Trademark Office reveal an intolerable attitude and continuing pattern of misconduct.

Arthur O. Klein of New York City, New York, and Westport, Connecticut, whose Patent Office attorney registration number is 19102, is suspended from practice as an attorney before the United States Patent and Trademark Office under the provisions of Section 32 of Title 35, U.S. Code, and Section 1.348, Title 37 of the Code of Federal Regulations, for the period of seven (7) years; execution of the last five (5) years is suspended and Respondent is being placed on probation for those five (5) years on each count (counts 1-4). The sanctions imposed for each count are to run concurrently. The terms of probation are:

***13** (i) Respondent shall comply with all disciplinary rules applicable to patent attorneys and agents practicing before the Patent and Trademark Office.

(ii) No document in any patent or trademark application can be filed in the Patent and Trademark Office by or on behalf of Respondent which (a) uses a certificate of mailing under 37 C.F.R. § 1.8, and (b) which indicates on the document that the document was prepared by, worked on, or signed by or on behalf of, Respondent.

After the first two (2) years of the seven (7)-year suspension and subject to the probationary five (5)-year period, Respondent may be reinstated to practice before the Patent and Trademark Office in patent cases upon compliance with the requirements of 37 C.F.R. § 10.160. [FN8] Respondent may or may not be required by the Director of Enrollment to take an examination.

No application for readmission shall be considered in less than two (2) years from the effective date of this Decision.

The effective date of this Decision is set for thirty (30) days from Decision date or, if appealed and sustained, thirty (30) days following exhaustion of such appeal process.

FNa1. ed. note: This matter is currently under judicial review pursuant to 35 U.S.C. § 32.

FN1. 37 C.F.R. § 1.8

37 C.F.R. § 1.8 ("Rule 8") (RX-112) provides with certain exceptions that a paper required to be filed in the PTO within a set period will be considered as being timely filed if the paper (1) is addressed to the Commissioner of Patents and Trademarks at Washington, D.C. 20231, (2) is deposited with the U.S. Postal Service with sufficient postage as first-class mail prior to the expiration of the set period, and (3) includes a certificate stating the date of deposit with the U.S. Postal Service.

FN2. Brigitte Metzler signed two (2) of the certificates of mailing, in the Menges application and in the Klinkhardt application. The ALJ

recited that the "Certificate of Mailing" was signed by one of Mr. Klein's secretaries etc." See paragraph VIII, page 5 and the last paragraph on page 6 of the Recommended Decision.

FN3. Respondent was given the opportunity to rely on his Fifth Amendment right against self-incrimination in refusing to admit or deny his signature and in withholding other information subject to the Solicitor's discovery requests (see Order of ALJ entered January 31, 1985, Part III) and chose not to, saying he had "nothing to hide" (see letter from Steven E. Lipman to ALJ dated February 8, 1985, item (1) and Motion By Respondent To Vacate Or Reconsider Order Of January 31, 1985, filed February 11, 1985, item C, page 19.

FN4. Circumstantial evidence can be used to prove any fact, including a fact from which another fact is to be inferred. U.S. v. Kelly, 527 F.2d 961, 965 (9th Cir.1976). Moreover, even where no single piece of circumstantial evidence supports a finding of guilt, the accumulation of such evidence can support such a finding. See U.S. v. Morando-Alvarez, 520 F.2d 882, 884-85 (1975).

FN5. 2A C.J.S. § 810, page 149.

FN6. In Argo Marine v. Camar Corp., 755 F.2d 1006, CA 2 (N.Y.) 1985, the Court held the District Court did not abuse its discretion by imposing discovery sanctions based upon finding that plaintiff had violated its discovery order concerning the producing of desk calendar pads. Fed.Rules Civ.Proc., Rule 37; In Wm. T. Thompson, Co. v. General Nutrition Corp., Inc., 593 F.Supp. 1443, 104 F.R.D. 119, 40 F.P.D. 3r-242, the Court stated, where from the inception of litigation, defendant was on notice that certain records it possessed were relevant to the litigation or at least reasonably calculated to lead to the discovery of admissible evidence, but nonetheless destroyed those and other relevant records, plaintiff was entitled to award of monetary sanctions. Fed.Rules Civ.Proc., Rule 37(b).

FN7. The failure of Respondent to produce the original of certain outgoing mail logs necessitated, and appropriately so, the reliance upon the incomplete copies (GX-14) as probative evidence by the Solicitor.

FN8. Supersedes 37 C.F.R. § 1.341(c).

END OF DOCUMENT